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IN THE

Supreme Court of the United States

October Term, 1961
No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District No. 9, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARY PETTELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MacFARLANE,

Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

BRIEF OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

CHARLES A. BRIND,
Attorney for Board of Regents of the University of the State of New York, Amicus Curiae,
State Education Building,
Albany, New York

Of Counsel.
JOHN P. JEHU,
ELIZABETH M. EASTMAN,
GEORGE B. FARRINGTON,
LOUIS H. J. WELCH.

[illegible] LAW PRINTERS,
[illegible] N. Y.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Board of Regents of the University of the State of New York respectfully move this Court for leave to file the accompanying brief in this case as *amicus curiae.* Un-

der Rule 42, subd. 4 of the Revised Rules of this Court, consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for an agency of a State sponsored by the authorized law officer thereof. The Board of Regents of the University of the State of New York is a lawfully authorized body, the head of the University of the State of New York and of the State Education Department, pursuant to New York State Constitution, Article V, Section 4, Article XI, Section 2, and Education Law, Sections 101 and 201, and Charles A. Brind, Esq., is the Counsel to the said Board of Regents of the University of the State of New York and of the New York State Education Department and as such is its authorized legal officer; he is a member of the Bar of this Court.

The Board of Regents of the University of the State of New York, the moving party, has an interest in this case in that it is charged by law with the general management and supervision of all public schools and all of the educational work of the State of New York, exercises legislative functions concerning the educational system of the State, determines its educational policies and establishes rules for carrying into effect the laws and policies of the State relating to education, pursuant to New York State Education Law, Sections 101 and 207.

In the exercise of its duties and functions, the said Board of Regents, on November 30, 1951, adopted a Statement of Belief on Moral and Spiritual Training in the Schools and, on March 25, 1955, adopted Recommendations for School Programs of America's Moral and Spiritual Heritage. The earlier of these two statements contained a recommendation to the school districts of New York State that the so-called "Regents Prayer", the use of which is the subject

matter of the cause at bar, be used daily in conjunction with the Pledge of Allegiance.

Respondent-Respondent Board of Education has followed the said Recommendation of the Board of Regents, *Amicus Curiae*, in relation to the prayer contained in such Statements, and has instructed its staff to have the same used daily, as recommended, in conjunction with the Pledge of Allegiance, and the same has been so used since September 1958, except for certain changes which we understand the Board of Education made in its procedures in compliance with Mr. Justice Meyer's order in the Supreme Court of New York State, Nassau County, Special Term, which was affirmed by the Appellate Division, Second Judicial Department and the Court of Appeals of the State of New York.

The Board of Regents, accordingly, is deeply interested in the litigation here involved and strongly supports the decisions of the Courts below which upheld the constitutionality of the prayer recommended by *Amicus Curiae*.

It is respectfully urged that the accompanying brief *amicus curiae* be accepted by this Court.

Dated: November 1, 1961.

Respectfully submitted,

CHARLES A. BRIND, JR.,
Counsel for Board of Regents of the University of the State of New York, Amicus Curiae,
State Education Building,
Albany, New York.

BRIEF OF *AMICUS CURIAE*

The Board of Regents of the University of the State of New York respectfully submits this brief as *amicus curiae* in support of the respondent.

This brief confines itself to the question of the constitutionality of the use of the prayer recommended by *Amicus Curiae* in the public schools of the State of New York.

Statement of the Case

Respondent Board of Education had determined to follow the recommendation of *Amicus Curiae* and had instructed its staff to use the so-called "Regents Prayer" (see Appendix A, attached hereto) daily in conjunction with the Pledge of Allegiance to the Flag.

Thereupon the present proceeding was instituted by petitioners herein, claiming that the said use of the said prayer was in violation of the United States Constitution and asking the Court to direct respondent Board of Education to discontinue the use thereof.

The petition herein was dismissed by the Nassau County Supreme Court, Special Term, upon a lengthy opinion of Mr. Justice MEYER (18 Misc. 2d 659). This order was affirmed by the Appellate Division of the New York State Supreme Court, Second Judicial Department (11 A. D. 2d 340). The Court of Appeals of the State of New York affirmed the order of the Appellate Division (10 N. Y. 2d 174).

The case is before this Court on a Writ of Certiorari to the New York Court of Appeals.

U. S. Code, Title 36, Chap. 10, Sec. 172

172. Pledge of Allegiance.—The following is designated as the pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

New York State Constitution

Article V, Section 4. [Department heads.]

The head of the executive department shall be the governor. The head of the department of audit and control shall be the comptroller and of the department of law, the attorney general. *The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department.* The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law. (Emphasis supplied.)

Article XI, Section 2. [Regents of the University.]

The corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents.

New York State Education Law

Section 101. Education department; regents of the university.

There shall continue to be in the state government an education department. The department is charged with the general management and supervision of all public schools and all of the educational work of the state, including the operations of The University of the State of New York and the exercise of all the functions of the education department, of The University of the State of New York, of the regents of the university and of the commissioner of education and the performance of all their powers and duties, which were transferred to the education department by section three hundred twelve of the state departments law or shall have been prescribed by law before March sixteenth, nineteen hundred twenty-seven, whether in terms vested in such department or university or in any sub-department, division or bureau thereof or in such commissioner, board or officer, and such functions, powers and duties shall continue to be vested in the education department continued by this chapter and shall continue to be exercised and performed therein by or through the appropriate officer, sub-department, division or bureau thereof,

together with such functions, powers and duties as hereafter may be conferred or imposed upon such department by law. All the provisions of this chapter, in so far as they are not inconsistent with the provisions of this chapter, as hereby amended or may be made applicable, shall apply to the education department continued by this chapter as hereby amended and to The University of the State of New York, the board of regents of the university, the commissioner of education and to the divisions, bureaus and officers in such department. The head of the department shall continue to be the regents of The University of the State of New York, who shall appoint, and at pleasure may remove, the commissioner of education. The commissioner shall continue to be the chief administrative officer of the department. The regents also may appoint and, at pleasure, remove a deputy commissioner of education, who shall perform such duties as the regents may assign to him by rule and who, in the absence or disability of the commissioner or when a vacancy exists in the office of commissioner shall exercise and perform the functions, powers and duties conferred or imposed on the commissioner by this chapter. The regents of The University of the State of New York shall continue to constitute a board and The University of the State of New York, which was continued under such name by section two of article eleven of the constitution, shall continue to be governed and all its corporate powers to be exercised by such board.

Section 201. Corporate name and objects.

The corporation created in the year seventeen hundred eighty-four under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. Its objects shall be to encourage and promote education, to

visit and inspect its several institutions and departments, to distribute or to expand or administer for them such property and funds as the state may appropriate therefor or as the university may own or hold in trust or otherwise, and to perform such other duties as may be intrusted to it. The said corporation shall have power to take, hold and administer real and personal property and the income thereof in trust for any educational, scientific, historical or other purpose within the jurisdiction of the regents of The University of the State of New York.

Section 207. Legislative power.

Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trust conferred or charged upon the university and the education department. But no enactment of the regents shall modify in any degree the freedom of the governing body of any seminary for the training of priests or clergymen to determine and regulate the entire course of religious, doctrinal or theological instruction to be given in such institution. No rule by which more than a majority vote shall be required for any specified action by the regents shall be amended, suspended or repealed by a smaller vote than that required for action thereunder. Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the

regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations.

Section 801. Courses of instruction in patriotism and citizenship and in certain historic documents.

1. In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, the regents of The University of the State of New York shall prescribe courses of instruction in patriotism and citizenship, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, over the age of eight years, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.

2. The regents shall prescribe courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the State of New York and the amendments thereto, to be maintained and followed in all of the schools of

the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools in grades or classes corresponding to the instruction in the eighth and higher grades of the public schools shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils in the public schools of the city or district in which such pupils reside.

3. The regents shall determine the subjects to be included in such courses of instruction in patriotism and citizenship and in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto, and the period of instruction in each of the grades in such subjects. They shall adopt rules providing for attendance upon such instruction and for such other matters as are required for carrying into effect the objects and purposes of this section. The commissioner of education shall be responsible for the enforcement of such section and shall cause to be inspected and supervise the instruction to be given in such subjects. The commissioner may, in his discretion, cause all or a portion of the public school money to be apportioned to a district or city to be withheld for failure of the school authorities of

such district or city to provide instruction in such courses and to compel attendance upon such instruction, as herein prescribed, and for a non-compliance with the rules of the regents adopted as herein provided.

4. The regents shall designate a week during each year and prescribe a uniform course of exercises in the public schools of the state suitable for pupils of various ages to instill into the minds of such pupils the purpose, meaning and importance of the bill of rights articles in the federal and state constitutions. Such exercises shall be in addition to any prescribed courses of study in the schools.

Interest of *Amicus Curiae*

The Board of Regents is the head of the University of the State of New York and of the State Education Department, pursuant to New York State Constitution, Article V, Section 4, Article XI, Section 2, and New York State Education Law, Sections 101 and 201.

The Board of Regents is charged by law with the general management and supervision of all public schools and all of the educational work of the State, exercises legislative functions concerning the educational system of the State, determines its educational policies and establishes rules for carrying into effect the laws and policies of the State relating to education (Education Law, Sections 101 and 207).

In the exercise of its duties and functions, the Board of Regents, on November 30, 1951, adopted a Statement of Belief on Moral and Spiritual Training in the Schools and, on March 25, 1955, adopted Recommendations for School Programs on AMERICA'S MORAL & SPIRITUAL HERITAGE, copies of which are attached hereto and made a part hereof, as Appendices A and B, respectively.

Respondent-Respondent Board of Education has followed the Recommendation of the Board of Regents in relation to the prayer contained in such Statements, and has instructed its staff to have the same used daily, as recommended, in conjunction with the Pledge of Allegiance, and the same has been so used since September 1958, except for certain changes which we understand the Board of Education made in its procedures in compliance with Mr. Justice Meyer's order below which was affirmed by the Appellate Division, Second Judicial Department.

The Board of Regents, accordingly, is deeply interested in the litigation here involved and consequently supports the decisions of the Courts below which upheld the constitutionality of the prayer recommended by *Amicus Curiae*.

Summary of Argument

It is the position of *Amicus Curiae* that the prayer recommended by them to be used in the public schools of the State of New York, in conjunction with the Pledge of Allegiance to the Flag, does not and cannot violate the provisions of the First Amendment to the United States Constitution:

(1) Because the wording of the prayer is derived from the language used in the Declaration of Independence, in Lincoln's Gettysburg Address, in U. S. Code, Title 36, Chapter 10, Section 172, and in the State Constitutions of all but one of the States of the Union.

(2) Because the language used in the recommendation of *Amicus Curiae* is in line with previous decisions of this Court, and in line with national institutions of various kinds, such as certain official holidays, official oaths of office, the invocation by the Marshall of

this Court before the opening of each session, inscriptions on coins, and many others.

(3) Because the recommendation carries out certain mandates of the New York State Education Law requiring *Amicus Curiae* to prescribe for use in the State courses of instruction in the history and significance of the Constitutions of the United States, its amendments, the Declaration of Independence, and others.

(4) Because the recommendation is made on the basis of the understanding and recognition that the use of this prayer cannot be enforced against students whose conscience or religious beliefs forbids them to participate.

(5) Because, as demonstrated by Madison's "Memorial and Remonstrance," such prayer is not in violation of the spirit and intent of the framers of the First Amendment to the United States Constitution.

POINT I

The use of the recommended prayer by Respondent-Respondent School Board is not in violation of the Constitution of the United States of America, nor of the Constitution of the State of New York.

A. It should be pointed out at the outset that each member of the Board of Regents must take the constitutional oath of office, which reads as follows:

> "I do solemly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability."

It must also be pointed out that the Board of Regents, at the times of the adoption of the Statements referred to above, counted five attorneys among its members (William J. Wallin of Yonkers, Welles V. Moot of Buffalo, John F. Brosnan of New York, Jacob L. Holtzmann of New York, and George L. Hubbell, Jr. of New York), including a former President of the New York County Lawyers Association (John F. Brosnan, Chancellor of the Board of Regents until April 1, 1961); and that the Board now is, and then was, served by a Counsel who has been on the Board's legal staff since 1923, Director of the Law Division since 1932 and Counsel since 1941.

Consequently, it is apodictic that the Board of Regents at the times here involved was, as it now is, fully aware of and conversant with the doctrine of separation of Church and State. The Board is, needless to say, firmly and unalterably convinced of the paramount importance of this basic constitutional doctrine, both as the powerful bulwark of religious freedom and as the only possible guarantee of protection against religious strife among our people.

The Board, nevertheless, is also aware of the dire need, in these days of concentrated attacks by an atheistic way of life upon our world and in these times of rising juvenile delinquency, of crime increasing both numerically and in gravity of offense, with an ever-swelling number of criminals being counted in the younger age groups, of finding ways to pass on America's Moral and Spiritual Heritage to our youth through the public school system.

The Statements hereinabove referred to were a result of this effort.

With the increasing number of divorces, annulments and separations, and the resulting broken homes, rising numbers

of our youth are being deprived of moral and spiritual guidance. Hence, the role of the public school system, in supplying this need, *to the extent that it may properly do so*, becomes of the greatest import and significance in our national life.

Thus, the Board of Regents devised a prayer recommended to be used as an incident to and part of the Pledge of Allegiance ceremony, which would strengthen the sense of interdependence of our way of life and the belief in a Supreme Being acknowledged by the great mass of organic utterances and, throughout our history, by all presidents and national leaders in all walks of life.

The prayer reads as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

It will be noted that this prayer is divisible into three basic parts:

1. The invocation of "Almighty God."

   This invocation is contained, verbatim, in the Constitution of the State of New York, and in the Constitutions of 33 other States (Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont and Wisconsin).

2. "* * * we acknowledge our dependence upon Thee * * *".

The acknowledgement of dependence upon God is contained, in one form or another, in the Constitution of every State of the Union, including those of Alaska, and of Hawaii.*

It is also contained in the Declaration of Independence, in Lincoln's Gettysburg Address, and in U. S. Code, Title 36, Chapter 10, Section 172, as amended in 1954 (see *Lewis* v. *Allen*, 5 Misc. 2d 68; affd. 11 A. D. 2d 447).

3. "* * * we beg Thy blessings upon us * * *".

An express acknowledgment or invocation of the "blessing" or "blessings" [of a Supreme Being], consisting of our freedoms and national heritage, is contained both in the Preamble to the Constitution of the United States (". . . the Blessings of Liberty . . ."), the Constitution of the State of New York and the Constitutions of 28 other States (Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia and Wisconsin).

How, then, can it be seriously argued that a prayer, combining these various phrases, culled from the basic law of the land, and used as an incidental part of the Pledge of

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* The preamble of the proposed constitution of Hawaii, for instance, reads as follows:

"We, the people of the State of Hawaii, *grateful for Divine Guidance*, and mindful of our Hawaiian heritage, reaffirm our belief in a government of the people, by the people, and for the people, and with an understanding heart toward all the people of the earth, do hereby ordain and establish this constitution for the State of Hawaii." (Emphasis supplied)

Allegiance ceremony in the public schools, is in violation of any Constitution?

Without in any way detracting from the effectiveness and potency of our immutable principle of separation of Church and State, it must be pointed out that this principle is by no means one of hostility to religion, but is, in effect, designed to protect, forever, our freedom of religion and conscience, under which every man is free to conduct himself in that respect according to his own convictions.

Throughout our history, the recognition that "this is a religious nation" (*Church of Holy Trinity* v. *U. S.*, 1892, 143 U. S. 457 at 470); that "We are a religious people whose institutions presuppose a supreme being" (*Zorach* v. *Clauson*, 1951, 343 U. S. 306 at 313); that "The American people are and always have been theistic" (*Doremus* v. *Board of Education*, 5 N. J. 435; appeal dismissed 342 U. S. 429, 1952), merely takes cognizance of the fact that "From the discovery of this continent to the present hour, there is a single voice making this affirmation" (*Church of Holy Trinity* v. *U. S.*, *supra*).

It is not the intent of *Amicus Curiae* to burden the Court with a repetition of the many arguments so ably presented in the lengthy briefs of Respondent-Respondent Board of Education and of Intervenors-Respondents. Suffice it to point to the role played in our history and national life of such institutions and facts as:

Christmas and Easter vacations and holidays;

The observance of Sunday (pursuant to laws upheld consistently by the Courts);

Thanksgiving Day, established by Presidential Proclamation;

The Presidential Oath of Office;

The invocation by the Marshal of the United States Supreme Court before the opening of each session ("God save the United States and this Honorable Court").

The invocation and benediction said before and after all sessions of Congress, State Legislatures and official boards and bodies;

The oath used in judicial process;

The inscription on our coins, stamps and bank notes.

It would be carrying coals to New Castle to even try to list all the historic documents of our past which recognize our dependence on Almighty God and invoke his "Blessing". Their number is legion, and many of the decisions cited and quoted in Respondent-Respondent's (Board of Education) brief also list them, such as *Church of Holy Trinity* v. *U. S.*, *supra*. The Court there skims the surface of the wealth of available material, from Christopher Columbus' Commission for Discovery, Sir Walter Raleigh's First Colonial Grant, the early Charters of Virginia and other colonies, the famous Compact of the Pilgrims, the Fundamental Orders of Connecticut, the Pennsylvania Charter of Privileges, to the Declaration of Independence and the Constitutions referred to above, along with others.

A comprehensive list of such documents would fill volumes, and too much has been written about the subject to further dwell on it here.

These and many other instances prove what the Courts have stated again and again that, in the words of *Everson* (330 U. S. at 18):

> "State power is no more to be used so as to handicap religions than it is to favor them."

or in the words of *McCollum* (333 U. S. 203):

> "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals *does not* as counsel urge *manifest a governmental hostility to religion, or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.*" (Emphasis supplied).

It is noted also that the Education Law (Section 801) charges *Amicus Curiae* with the duty

> "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war * * *."

and lists, specifically, a duty for them to prescribe

> "courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the State of New York, and the amendments thereto * * *."

Included in this, through the Declaration of Independence, are such phrases as "nature's God", "endowed by their Creator with certain unalienable rights * * *", "the Supreme Judge of the World", "the protection of Divine Providence".

B. It is submitted that the addition of the prayer in question to the Pledge of Allegiance ceremony in the public schools does not interfere with the proper accommodation

of the two constitutional principles here involved: The First Amendment to the Constitution of the United States on the one side; and the exercise of the reserved power of the States over education, including the need to familiarize all public school pupils, regardless of creed, with the religious nature of our national heritage, on the other side.

It is submitted that the acceptance by school boards of the Recommendation of *Amicus Curiae* in this respect does not constitute a "law respecting an establishment of religion".

The question here is, whether or not the prayer recommended by *Amicus Curiae* amounts to "an establishment of religion" within the meaning of the First Amendment to the United States Constitution, and as that phrase was used by the framers of the Amendment.

Hence, it becomes important to search out what that term meant to the Founding Fathers.

One of the most eloquent and effective architects of the Amendment was James Madison. And, probably the strongest expression of the sentiments in favor of separation of Church and State, prevailing at the time in Virginia, is a document drafted by James Madison, and which gained the approval and signatures of an overwhelming number of the citizens of Virginia, *viz.*, his famous "Memorial and Remonstrance" against a bill introduced in the Virginia Legislature, providing for tax support of Teachers of the Christian Religion.

The importance of this document in the interpretation of the First Amendment is emphasized by the fact that the United States Supreme Court, in 1947, referred to it extensively, in the *Everson* case (330 U. S. 1, 12, 13, 34, 63).

The term "establishment" or "establish" is used at least eight times in the document.

Thus, we see that the enactment of a bill raising a general tax for the advancement of all religions was considered by Madison "an establishment of religion".

Thus, we further see that he considered religion to be wholly exempt from tax or other compulsory support by government enactment of any kind, because any such support would be a violation of religious liberty and of the equal right to the free exercise of religion by all citizens. Any such support, consequently, he considered to be "an establishment of religion".

So much clearly is said by Madison.

The question now is—*did he consider an invocation of the Deity in general terms and without use of denominational terminology*[1] *to be in the nature of such "an establishment of religion"?*

It is obvious that the answer, if one can be found, is determinative of the issue here to be briefed. *The answer can indeed be found for it is in fact contained in the document itself and in Madison's own words.*

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[1] *Cf.* the passage in Jefferson's Autobiography (quoted in Norman Cousins' book "In God We Trust" "The Religious Beliefs and Ideas of the American Founding Fathers", p. 120) which speaks of the proposed change in the "Act for Establishing Religious Freedom" passed by the Virginia Assembly in 1786 (*ibidem*, p. 125): "Where the preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word 'Jesus Christ' so that it should read 'a departure from the plan of Jesus Christ, the holy author of our religion': the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mohometan, the Hindoo, and Infidel of every denomination."

It must be remembered here that this Memorial and Remonstrance was addressed "To The Honorable The General Assembly of the Commonwealth of Virginia" by a member of the House of Delegates serving on the Committee on Religion.

It must also be remembered that it was not lightly that Madison entered upon the drafting of this document, having deliberately stayed out of personal participatior in this controversy[2], and that he was asked by a group of prominent Virginians to draft the document.[3]

It is obvious, therefore, as it is from a reading of the Memorial itself that the author put a great deal of careful thought into the draft and would not have included anything therein which, in his thinking, would have been contrary to the purpose of the document.

With this in mind we peruse the following closing passage of the Remonstrance:

> "And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; *earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them; and on the other, guide them into every measure which may be worthy of his* [*blessing*, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth." (Emphasis supplied)

It is, therefore, earnestly submitted that the question whether or not such a prayer is in the nature of "an es-

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[2] See Madison's Letter to Edmund Randolph, July 26, 1785.

[3] See Madison's Letter to George Mason, July 14, 1826.

tablishment of religion", as Madison himself used the term, *must clearly be answered in the negative.*

Had he considered an official invocation of the Diety or such an acknowledgment of human dependence upon Him to be objectionable in the light of the principle of separation of Church and State, he most certainly would not have concluded this most important official document with such an invocation and acknowledgment.

It is thus clear that the recognition of, and acknowledgment of, our dependence on "the Supreme Lawgiver of the Universe" was, in Madison's own thinking, not only proper, but his *duty* ("as we are in duty bound") in the transaction of important functions of the body politic.

What is true of that recognition and acknowledgment, it is submitted, is without question also true of the recognition and acknowledgment of the Deity contained in the prayer recommended by *Amicus Curiae.*

The wealth of available materials in legislative enactments, letters and statements of the Founding Fathers makes it impractical to illustrate the above on more than one example, such as the document discussed hereinabove.

Since the example selected, however, is probably the strongest expression of the principle of separation of Church and State, and since even that very document makes it clear that the recommended prayer is unobjectionable, it is, therefore, respectfully submitted that the use of the prayer recommended by *Amicus Curiae* for use in the public schools of the State of New York, in connection with and as an incident to the Pledge of Allegiance ceremony, is not in violation of the First Amendment to the United States Constitution, and that, therefore, the petition herein should be dismissed on the merits.

Since there is no compulsion whatever about the recommended use of this prayer, it is obvious that its use does not "prohibit the free exercise of religion" within the meaning of the Federal Constitution.

For the same reasons stated above, in relation to the Federal Constitution, it is further submitted that such acceptance of the Recommendation of *Amicus Curiae* does not interfere with the "free exercise and enjoyment of religious profession and worship without discrimination or preference", nor with the "liberty of conscience", secured by the Constitution of the State of New York.

It must be stated here that this case does not deal with a situation where petitioners' children were or are being *forced* to recite a prayer contrary to their beliefs, either in wording, required posture during the prayer, or even by required presence during the same.

Amicus Curiae is fully aware of such decisions as *Bolling* v. *Superior Court*, 16 Washington 2nd, 373, or *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; or the great and moving concurring opinion of Judge Lehman in *People* v. *Sandstrom*, 279 N. Y. 523, 533.

The Recommendation was made, therefore, with the implicit understanding that no child would ever be forced, contrary to its conscience, to recite this prayer or even the words "under God" in the Pledge of Allegiance, or even the Pledge itself. Schools are expected and, on appeal to the Commissioner of Education under Section 310 of the New York State Education Law, in a proper case, would be ordered to accommodate each child according to his conscience and his parents' wishes, by either allowing him to leave the room, or to remain silent throughout the ceremony, or a proper part thereof, as the case may be.

C. It is, finally, submitted that if petitioners here are trying to *prevent* their children and others of their respective persuasions from any *exposure* to the fact that the great majority of the citizens of this country have throughout its history acknowledged, and do now acknowledge, the existence of a Divine Being, both as a matter of national history and as a matter of present fact, *they are indeed asking for the impossible.*

This would require the omission of a large, if not the greater, part of all history in the course of instruction and, as far as today's facts of like are concerned, would be even more impossible. Pupils are being transported to religious schools in this State (both under the *Everson* case and a 1939 amendment to the New York State Constitution). The released time program (*Zorach* and several New York State cases) is in effect in many school districts. Thus, pupils must be immediately aware of the fact that some children attend religious schools and that some children attend religious instruction under the released time program. Children, further, cannot help but notice the fact that churches and synagogues exist and that people stream to them at certain times. As soon as children can read, they cannot help but notice the inscription "In God We Trust" on the coins which they are given to purchase candy or chewing gum.

Thus, it is obvious that the child at a very early age is bound to come in contact with the word and concept "God", and their connection with our life, history and national heritage. This contact and knowledge cannot and should not be eliminated from any child's life, even though he has every right to disagree.

POINT II

The petition for writ of certiorari should be denied.

It is, therefore, respectfully submitted that the use of the prayer recommended by *Amicus Curiae* for use in the public schools of the State of New York, in connection with and as an incident to the Pledge of Allegiance ceremony, neither violates the doctrine of separation of Church and State, nor any other provision of the Constitution of the United States, nor the Constitution of the State of New York, and that, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES A. BRIND,
Attorney for Board of Regents of the University of the State of New York, Amicus Curiae,
Office & P. O. Address,
State Education Building,
Albany, New York.

Of Counsel:
JOHN P. JEHU,
ELIZABETH M. EASTMAN,
GEORGE B. FARRINGTON,
LOUIS H. J. WELCH.

APPENDIX A

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT ALBANY

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

BELIEF IN and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.

Our State Constitution opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged

came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee, by father's side, and as such faith is expounded and strengthened for them by his or her religious leaders.

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare.

We believe that such is the best way of insuring that this Government and our way of life shall not perish from the earth.

We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.

The foregoing statement of belief was unanimously adopted by the State Board of Regents at its regular meeting on November 30, 1951.

R967m-Je56-2000(39908)*

APPENDIX B

THE *REGENTS' RECOMMENDATIONS*
FOR *SCHOOL PROGRAMS* ON
AMERICA'S MORAL &
SPIRITUAL *HERITAGE*

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THE REGENTS' RECOMMENDATIONS
FOR SCHOOL PROGRAMS ON
AMERICA'S MORAL & SPIRITUAL HERITAGE

Unanimously Adopted *by the* Regents
March 25, 1955

*

The UNIVERSITY of the STATE
of NEW YORK

The State Education Department
Albany
1955

The UNIVERSITY of the STATE
of NEW YORK

Regents of the University

WILLIAM J. WALLIN, A. M., LL. D.,
Chancellor Emeritus, Yonkers

JOHN P. MYERS, A. B., D. Sc., LL. D., D. Eng.,
Chancellor, Plattsburgh

EDWARD R. EASTMAN, LL. D., Litt. D.,
Vice Chancellor, Ithaca

Appendix B.

Welles V. Moot, A. B., LL. B., LL. D.,
Buffalo

Mrs. Caroline Werner Gannett, L. H. D., LL. D.,
Rochester

Roger W. Straus, Litt. B., LL. D., L. H. D., D. H. L.,
New York

Dominick F. Maurillo, A. B., M. D., LL. D.,
Brooklyn

John F. Brosnan, A. M., LL. B., J. D., LL. D., D. C. L.
New York

Jacob L. Holtzmann, LL. B., LL. D., D. C. L.,
New York

Edgar W. Couper, A. B., LL. D.,
Binghamton

Alexander J. Allan, Jr., LL. D., Litt. D.,
Troy

Thad L. Collum, C. E.,
Syracuse

George L. Hubbell, Jr., A. B., LL. B.,
New York

AMERICA'S MORAL & SPIRITUAL HERITAGE

On November 30, 1951, the Regents issued their Statement on Moral and Spiritual Training in the Schools, which opened with these words: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

In such Statement, the Regents expressed their convictions that such fundamental belief and dependence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth.

Such Statement contemplated the issuance of a Supplemental Statement setting forth the Regents' recommendations for programs in the schools stressing the Moral and Spiritual Heritage of America. This is the Supplemental Statement

5

In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child.

6

FUNDAMENTAL BELIEFS

LIBERTY *under* GOD • RESPECT *for the* DIGNITY & RIGHTS *of* EACH INDIVIDUAL • DEVOTION *to* FREEDOM

The Brotherhood of Man
under the Fatherhood of God

Our Founding Fathers set forth in the Declaration of Independence, with unequaled clarity and simplicity, the fundamental moral and spiritual ideals of this Nation:

Appendix B.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

"All men are created equal" is the basic principle of the Brotherhood of Man, and "endowed by their Creator with life, liberty and the pursuit of happiness" is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and

not from the kings, princes or other men. The proposition that "government derives its just powers from the consent of the governed" is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen, who, with his fellow citizens, is master of the state they have created and not its servant.

The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, "We are a religious people whose institutions presuppose a Supreme Being."

The Constitution of the State of New York opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

Appendix B.

The Great Seal of the United States has as its symbol for future generations an unfinished pyramid of thirteen steps, representing the thirteen colonies, which pyramid is placed under the eye of God, and the motto, "Annuit Coeptis," meaning "He Has Favored Our Undertaking." This motto is repeated on every dollar bill, and our common coins and stamps carry the words, "In God We Trust."

Our Presidents and other great leaders again and again have recalled to our people their dependence upon Almighty God and their obligations to their fellow men, and the necessity of vigilantly protecting their liberty and their freedom. From the countless stream of quotations we cull the following:

At the Constitutional Convention in Philadelphia, Washington, as Chairman, set the spiritual tone for the sessions when he said: "Let us raise a standard to which the wise and honest can repair. The event is in the hand of God."

8

When the delegates at the Convention seemed hopelessly in disagreement, Benjamin Franklin, "imploring the assistance of Heaven," said, "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God Governs in the affairs of men."

• • •

Washington, in taking his oath of office at his First Inaugural, said:

> *No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by*

which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency; and in the important revolution just accomplished and in the system of their united government the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seems to presage. . . .

• • •

Again, in his Farewell Address, Washington puts his convictions into these enduring words: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

• • •

Abraham Lincoln at Gettysburg said:

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

9

He added that our soldiers fought and died there so "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

• • •

In another address these were his words:

> *Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors.*

• • •

And in one of his last public speeches he uttered the sublime thought:

> *With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.*

• • •

In all these expressions Lincoln put into words the spiritual motivations for the sacrifices made not only by the heroes of Gettysburg and the other battles of the Civil War, but also of all Americans who have gone into battle, whether at Lexington, San Juan Hill, the Argonne Forest, Iwo Jima or Heartbreak Ridge.

• • •

Woodrow Wilson, in urging the American people to extend the principles of the Founders of this Republic into the realm of world leadership, said: "I summon all honest men, all patriotic, all forward-looking men to my side. God

helping me, I will not fail them, if they will but counsel and sustain me!"

10

Finally, President Eisenhower brings our national moral and spiritual ideals down to date in these words: "Without God there could be no American form of government, nor an American way of life. . . . Thus the Founding Fathers saw it; and thus, with God's help, it will continue to be. . . . The path we travel is narrow and long—beset with many dangers. Each day we must ask that Almighty God will set and keep His protecting hand over us so that we may pass on to those who come after us the heritage of a free people, secure in their God-given right and in full control of a government dedicated to the preservation of those rights."

Throughout our entire history as a Nation, these Fundamental Beliefs have been our moral and spiritual ideals, our guiding star and our compass in time of storm and trouble. They should be a living part of the lives of all our children.

• • •

Devotion to Freedom

How well this is expressed in these challenging words of Thomas Jefferson: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."

Our freedom of speech and worship and of the press, and to do all things which do not harm others, are highly important, but of even greater importance is the desire and

will of the people to have them and to preserve them. The only way for freedom-loving people to secure the "blessings of liberty to ourselves and our posterity" is eternal vigilance through actions that are in response to the Moral Law. In the words of the Chancellor of the Board of Regents, opening our 1953 Convocation, "Freedom is not free—it must constantly be defended and cared for lest we lose it. That is the price we pay for it. We must reinterpret for our children the initiative, the courage and the faith of the Founding Fathers. We must root deeply in their hearts faith in the unimpeachable dignity of the individual and in the unquenchable spirit of free man."

11

Stressing Moral & Spiritual Values

We recommend:

First: That periods be set aside at frequent intervals during the school year which will be devoted to the intensive study of the foregoing fundamental and great American documents and pronouncements. The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed; of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God. Thus, as we heretofore stated, "the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare."

• • •

SECOND: The development of moral and spiritual values through all the activities and lessons of the school day and particularly by the good example of the school staff. For instance, sports and games may be used to build a sense of fair play, a willingness to lose a game rather than cheat, a desire to do to others as you would be done by and of striving to build a healthy mind and body. The study of science will develop honest dealing with facts, an open mind for new ideas and a keen alertness for the views and experiences of others, respect for truth and humility as one contemplates the vastness of space, the minuteness of the atom and the reign of law and order in the Universe. Biography will keep before pupils inspired examples of character, and encourage them with "the habitual vision of greatness." Friendship among pupils of inter-racial groups will constitute a strong bulwark against prejudice and intolerance.

12

Thus our children, inspired by the example of their ancestors, guided by the faith and love of their parents and encouraged by their spiritually sensitive teachers, will renew in their daily lives America's Moral and Spiritual Heritage:

LIBERTY *under* GOD • RESPECT *for the* DIGNITY
& RIGHTS *of* EACH INDIVIDUAL •
DEVOTION *to* FREEDOM

13

Certificate of Service

I, Charles A. Brind, attorney for Board of Regents of the University of the State of New York, *amicus curiae* herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of November, 1961, I served copies of the foregoing motion for leave to file a brief as *amicus curiae* and brief of *amicus curiae* on the several parties to the written proceeding as follows:

On Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, petitioners, by mailing copies in a duly addressed envelope with proper postage prepaid, to their respective attorneys of record, as follows:

Butler, Jablow & Geller
400 Madison Avenue
New York 17, New York

On William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, respondents, by mailing copies in a duly addressed envelope with proper postage prepaid, to their respective attorneys of record, as follows:

Gunn, Neier & Daiker
49 Main Street
Port Washington, New York

On Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. Mac-

Certificate of Service.

Farlane, intervenor-respondents, by mailing copies in a duly addressed envelope with proper postage prepaid, to their respective attorneys of record, as follows:

Hahn, Hahn, & Ford
117 Pennsylvania Avenue
Brooklyn 7, New York

CHARLES A. BRIND,
State Education Building,
Albany, New York,
Attorney for Board of Regents of the University of the State of New York, Amicus Curiae.